93-580

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For Allen County, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution prohibit the Ohio practice of alleging a criminal accusation in multiple pleadings which state an offense in alternative forms, thus failing to set forth with reasonable certainty the nature of the offense, thereby denying the defendant the opportunity to prepare a defense.

2. Whether the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution prohibit the Ohio practice of judging constitutional claims of vagueness in criminal accusations under an abuse of discretion standard.

PARTIES TO THE ACTION

The names of all parties to the action in the lower court appear in the caption to this case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeals for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

I. OPINIONS OF OTHER COURTS

On January 24, 1992, a jury verdict was returned against Mr. Lewis finding him guilty of theft by deception in excess of one hundred thousand dollars. Mr. Lewis was sentenced on March 23, 1992, by the Honorable Michael

A. Rumer, Judge of the Common Pleas Court of Allen County, Ohio. App. 31.

On January 7, 1993, the Ohio Court of Appeals, Allen County, Third Appellate District, affirmed Mr. Lewis' conviction. *State v. Lewis*, 85 Ohio App.3d 29, ___ N.E.2d ___ (1993 WL 262750, 1993). App. 1. On June 2, 1993, the Ohio Supreme Court denied without opinion Mr. Lewis' motion for leave to appeal. App. 15. On July 14, 1993, the Ohio Supreme Court denied without opinion Mr. Lewis' petition for rehearing. App. 16.

II. JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals of Ohio, Third Appellate District was entered on January 7, 1993, affirming petitioner's conviction dated March 23, 1992. On June 2, 1993, the Ohio Supreme Court denied petitioner's leave to appeal. Thereafter, on July 14, 1993, the Ohio Supreme Court denied a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

III. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

AMENDMENT V

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the law of the State wherein they reside. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATE STATUTORY PROVISIONS WHICH THE CASE INVOLVES

R.C. § 2913.01(A) Definitions [Deception]

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

R.C. § 2913.02 Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent:

(3) By deception;

(4) By threat. . . .

R.C. § 2941.05 Statement Charging an Offense

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Su h statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

R.C. § 2941.07 Bill of Particulars

Upon written request of the defendant made not later than five days prior to the date set for trial, or upon order of the court, the prosecuting attorney shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense.

C. UNITED STATES CODE

28 U.S.C. § 1257. **State Courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under the United States.

IV. STATEMENT OF THE CASE

An Allen County Ohio Grand Jury returned an indictment against Petitioner Gary D. Lewis. T.d. 0001. The indictment charged Mr. Lewis with one count of aggravated theft in violation of R.C. § 2913.02, one count of securing writings by deception in violation of R.C. § 2913.43, and one count of grand theft in violation of R.C. § 2913.02.[1] T.d. 0001.

On August 19, 1991, Mr. Lewis filed a Motion For Bill Of Particulars.[2] T.d. 0025. Mr. Lewis was provided a Bill

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[1] As to Count I, the indictment read as follows (omitting the dates and formal parts):

> GARY D. LEWIS . . . did with purpose to deprive the owner, to-wit: Frances M. Shepherd of property, to-wit: money in that he did knowingly obtain or exert control over said property without the consent of Frances M. Shepherd and/or beyond the scope of the express or implied consent of Frances M. Shepherd and/or by deception. The said Gary D. Lewis having committed more than one theft offense during the given span of time in the same capacity or relationship with Frances M. Shepherd, to-wit: employee and/or friend and/or lover. The aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand ($100,000.00) Dollars. . . .

[2] The motion requested, *inter alia*, a specific and particular statement of how Mr. Lewis exerted control over Ms. Shepherd's property without her consent, beyond the scope of her

Of Particulars on September 19, 1991.[3] T.d. 0042. On October 23, 1991, Mr. Lewis filed his Motion To Dismiss The Indictment Or For Alternative Relief.[4] T.d. 0064. In

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express or implied consent, or by deception; of the dates and amounts of each alleged theft; and how and when Mr. Lewis was an employee and/or friend and/or lover.

[3] The Bill stated in part:

> Count One of the Indictment sets forth a Theft Offense in excess of One Hundred Thousand Dollars ($100,000) and is plead (sic) in the alternative. Either Gary D. Lewis did without the consent of Frances M. Shepherd or beyond the scope of expressed or complied consent of Frances M. Shepherd, or by deception of Frances M. Shepherd, exert control over money and that the Defendant, Gary D. Lewis, committed more than one theft offense during the given span of time in the same capacity or relationship with Frances M. Shepherd, to wit: employee and/or friend and/or lover. The Defendant, Gary D. Lewis, on several occasions, told more than one individual that he was employed by Frances M. Shepherd and the monies that he received was (sic) for that employment. On other occasions, he indicated to individuals that the money he received from her was a gift. . . . With regard to the issue of Gary D. Lewis being an employee and/or friend and/or lover, the State would again reiterate that the Defendant, Gary D. Lewis, had indicated to other witnesses he was an employee of Frances M. Shepherd, a friend or lover. . . .

[4] The Motion stated, *inter alia*:

> 1. The indictment, taken with the bill of particulars is unlawfully vague.
>
> * * *
>
> 3. The indictment, taken with the bill of particulars is duplicitous.
>
> * * *

response to Mr. Lewis' motion, the State provided an Amended Bill Of Particulars.[5] T.d. 0074. On December 4, 1991, the trial court sustained Mr. Lewis' Motion of October 23, 1991, holding that Count I of the indictment was unconstitutionally vague. The court allowed the State to attempt to cure this deficiency by providing more detailed information as to Count I by a second amended bill of particulars.[6] T.d. 0086. On December 16, 1991, Mr.

> 9. That, without a delineation as to which transaction specifically is illegal, and specifically why the transaction is illegal, the charges are unlawfully vague and the defendant cannot prepare for trial. For example, unless the State of Ohio were to specifically state that check number X was obtained by deception as opposed to beyond the consent of Frances Shepherd, there is no way to prepare for trial.

[5] The Amended Bill Of Particulars stated in part:

COUNT I: From on or about January 11, 1982 to on or about December 5, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, the defendant did with purpose to deprive the owner, Frances M. Shepherd of property, to wit: money, knowingly obtained or exerted control over said money by deception to wit: a) induced gifts based on false indications of affection and/or on false promises to take care of the victim, and/or b) induced gifts based on false statements of need, and/or c) secured payment for services not rendered by others, and/or d) secured payment for services not rendered by himself, and/or e) deposited victim's monies into his own accounts without authority of the victim, and/or f) by other means. The defendant committed more than one theft offense during the alleged time period in the same capacity of relationship to the victim, Frances Shepherd, to wit: employee and/or friend and/or lover. . . .

[6] The entry provided in part:

> Conversely, due to the vagueness of the pleadings the defendant cannot know what conduct the State claims

Lewis was provided with the State's Second Amended Bill Of Particulars Count I.[7] T.d. 0105. On December 20, 1991, Mr. Lewis filed his Objection To State Of Ohio's Second Amended Bill Of Particulars/Renewed Motion To

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> to be unlawful prior to May 22, 1985 or challenge the value of property allegedly stolen. In both events, defendant is being denied due process of law by thwarting his ability to properly prepare a defense to Count 1. *State v. Lawrinson* (1990), 49 O.S.3d 238, [551 N.E.2d 1261]; *State v. Sellards* (1985), 17 O.S.3d 169, [478 N.E.2d 781].
>
> The proper remedy at this juncture is not dismissal of Count 1. The proper remedy is for the State to specify the date of each theft offense it alleges occurred, the capacity of the accused at the time of the alleged occurrence, and the conduct on each date which constituted the alleged offense. This can be accomplished by filing a second amended bill of particulars as to Count 1 only. The same shall be filed and served on or before December 16, 1991. The motion is further taken under advisement pending such filing.

[7] Prior to a listing of one hundred, ninety-one (191) checks allegedly negotiated or received by Mr. Lewis, was the following allegation:

> On or about January 11, 1982, through December 19, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, Gary D. Lewis did, with purpose to deprive the owner, to wit: Frances Shepherd, of property, to wit: money, knowingly obtained or exerted control over said money by deception. The said Gary D. Lewis having committed more than one theft offense involving the following listed monies during the alleged time period in the same capacity of relationship with Frances Shepherd, to wit: friend, the aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand Dollars ($100,000). . . .

Dismiss Count I.[8] T.d. 0119. On December 30, 1991, Mr. Lewis' Objection/Motion was overruled. T.d. 0131.

Thus, Mr. Lewis proceeded to trial by jury, still unaware of the exact nature of the charge against him or the State's theory of guilt. Count I of the original indictment was originally phrased in the alternative, alleging

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[8] The Objection/Motion stated in part:

> The second amended bill of particulars does not list the specific conduct which constitutes the alleged offense as ordered by the court. It does allege deception, however the defendant and the Court are still forced to speculate as to the state's theory of prosecution. . . . The purpose of Rule 7 (E) of the Ohio Rules of Criminal Procedure is to provide the defendant with this information so that he may properly prepare for trial. The State of Ohio has failed to comply with the requirements of Rule 7(E) as well as the court's order of December 4, 1991. . . .
>
> * * *
>
> The indictment, taken with the Bills of Particulars leaves the defendant with no way to properly prepare a defense. . . . Such freedom to change theories or identities of crimes alleged throughout the prosecution violates the defendant's rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Article One section 10 of the Constitution of the State of Ohio.
>
> Finally, the defendant submits that there is no way for the court to guarantee that the jury has reached a unanimous verdict. Some may find guilt on one theory, some another. Some may find the defendant acted in one capacity, some another. In short, the present posture of the case, leaves both defendant and the court in a procedural nightmare which is unfair to both.

violations of R.C. § 2913.02(A)(1), (A)(2), and (A)(3) each of which contemplates distinct theories of guilt. As amended by way of bill of particulars, the indictment alleged "deception," a term having several alternative, mutually exclusive meanings under Ohio law. The indictment alleged conduct supposedly occurring in various ways over a period of eight years.

At trial the prosecutor advanced many alternative theories of guilt.[9] Mr. Lewis objected, arguing that the bills of particulars did not clarify the State's theory or the nature of the charges against him, and further, that the State's theories were not within the indictment or the bills of particulars.

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[9] In his opening statement, the prosecutor described the deception as "a money laundering scheme." T.p. 421 (Vol. 3). The scheme involved receiving money from friends and relatives who received money without working for it. T.p. 421 (Vol. 3). Later, the prosecutor refers to "a new scheme of deception" where Mr. Lewis endorses Ms. Shepherd's checks and deposits them in his account. T.p. 422 (Vol. 3).

During closing argument, the prosecutor claimed the deception was that Ms. Shepherd believed Mr. Lewis was performing work for her for free, but Mr. Lewis was charging her for the work through friends. T.p. 1705 (Vol. 9). Next, the deception is Mr. Lewis telling Ms. Shepherd that people from New Jersey were going to beat her up, people were on her roof, Fran and Bob Johns were trying to kill her, and drug dealers wanted to steal from her. T.p. 1710-1711 (Vol. 9). Next, the deception is that Mr. Lewis loved Ms. Shepherd and would care for her. T.p. 1714 (Vol. 9). Finally, in the prosecutor's rebuttal, the deception is providing unneeded services, t.p. 1750 (Vol. 9), convincing Ms. Shepherd the Lima Police can't help her, t.p. 1753 (Vol. 9), and promises of love and care. T.p. 1754 (Vol. 9).

Counts II and III were dismissed at the close of the State's case. The jury returned a general verdict of guilty as to theft by deception on Count I. At sentencing and post trial, the trial court, addressing the issue of sufficiency of the evidence, advanced a new theory of guilt stating:

> The Court finds, based on the evidence, that the deception occurred by playing directly on and exacerbating Mrs. Shepherd's paranoia of her niece and others to obtain money.
>
> It is uncontroverted in this case that the defendant claimed to be providing surveillance and/or security assistance to Mrs. Shepherd. The deception, in this Court's opinion, lies in the fact that the defendant fostered the belief with Mrs. Shepherd that such assistance was necessary.

App. 24-25.

On direct appeal, Mr. Lewis argued that he did not "foster" such a belief in Ms. Shepherd, as it was also "uncontroverted" that Ms. Shepherd's paranoia of her niece and belief that surveillance and/or security was necessary was longstanding. Again, the State of Ohio offered new and alternative theories of guilt.[10] Changing

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[10] The State argued that the deception was based upon a) induced gifts based on false indications of affection and/or on false promises to take care of the victim; b) induced gifts based on false statements of need; c) secured payment for services not rendered by others; d) secured payment for services not rendered by himself; and e) deposited victim's monies into his own accounts without authority of the victim.

once again the theory supporting guilt, the Ohio Court of Appeals held that:

> By such action and omission, reasonable minds could conclude that appellant was confirming and/or perpetuating a false impression of Shepherd's [that "people from New Jersey" were on Shepherd's roof making noises and trying to scare her], which is deception, pursuant to R.C. 2913.01(A).

App. 8-9. Further, the Court of Appeals added a new form of deception purportedly supporting the conviction:

> Secondly, evidence was presented that there were checks made out to Shepherd, signed by her, and then endorsed by appellant and deposited into his own account, without Shepherd's knowledge. By such action, reasonable minds could conclude that appellant was withholding information from Shepherd, which again is deception, pursuant to R.C. 2913.01(A).

App. 9.

The Court of Appeals held that as the bill of particulars "clarified" the method of theft by alleging theft by "deception" as that term is defined by Ohio statutes, the trial court did not abuse its discretion by overruling Mr. Lewis' motion to dismiss. The court rejected Mr. Lewis' constitutional claim that because the statutory definition of deception contemplated several alternative, distinct and in some cases mutually exclusive theories of prosecution the indictment as "clarified" was still unconstitutionally vague. The Ohio Court of Appeals held that a review of Mr. Lewis' constitutional claim was limited to a

consideration under an abuse of discretion standard. App. 5.

Mr. Lewis now requests that this Court grant him the considered review to which he was entitled, but denied, by the Ohio Appellate Courts.

A. HOW THE FEDERAL QUESTION WAS PRESENTED

Mr. Lewis first raised the application of the Federal Constitution prior to trial in his Objection To State Of Ohio's Second Amended Bill of Particulars/Renewed Motion To Dismiss Count I on December 20, 1991. The trial court denied the motion without comment on the Federal Constitutional Issue, stating: "Based upon consideration of the [Motions to Dismiss] the Court finds said motions not well taken and therefore overruled." T.d. 0131; App. 33. Periodic objections were made and rejected during trial and after trial. Mr. Lewis maintained his Federal Constitutional Question on direct appeal. Mr. Lewis' conviction was affirmed, again without comment on the Federal Constitutional Issue. Finally, Petitioner raised the Federal Constitutional Question in his Petition for Leave to Appeal to the Ohio Supreme Court. The Court denied without opinion Mr. Lewis' petition and request for rehearing.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decisions of the Ohio Courts are such a severe departure from this Court's precedent in *Russell v. United States*, 369, U.S.

749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) that this Court should correct the rejection or misinterpretation of that doctrine by the Ohio courts. The rejection by the Ohio courts of the *Russell* doctrine allows situations such as Petitioners' where the conviction rests upon charges which did not specifically inform him of the nature and cause of the accusation as mandated by the United States Constitution, Amendments V, VI and XIV.

Because Ohio law is inconsistent in its application of the function of the indictment and a corresponding bill of particulars, criminal defendants in Ohio are particularly at risk of being forced to trial upon vague charges. Ohio law generally holds an indictment is sufficient if it describes a public offense and it may be in the words of the section of the Revised Code describing the offense. R.C. § 2941.05. As is demonstrated, *infra*, an indictment may therefore be "sufficient," under Ohio law yet constitutionally deficient. In such a case, a line of Ohio cases holds that an accused has a right to a Bill of Particulars "setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense." R.C. § 2941.07. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985); *State v. Fowler*, 174 Ohio St. 362, 189 N.E.2d 133 (1984); *State v. Gingell*, 7 Ohio App.3d 364, 455 N.E.2d 1066 (1982); *State v. Dinsio*, 4 Ohio App.2d 309, 212 N.E.2d 606 (1964).

However, Ohio cases hold also that a bill of particulars may not be used to cure "fundamental defects" in an indictment. *State v. Gingell, supra*. The result of these contradictory doctrines is that in Ohio, there exists no requirement that the description of the offense provided

by bill of particulars comport to the constitutional mandates of the Sixth Amendment. In short, Ohio decisions and procedural rules do not require compliance with the Sixth Amendment's requirement that the accused "be informed of the nature and cause of the accusation" as required by *Russell, supra*. Further, by using an abuse of discretion standard of review, constitutional claims of vagueness are not appropriately considered by the Ohio courts.

A. THE OHIO COURT OF APPEALS APPLIED AN IMPROPER STANDARD OF REVIEW IN REVIEWING MR. LEWIS' CONSTITUTIONAL CLAIM

Where the indictment is "legally sufficient" in describing the elements of a given offense, yet constitutionally insufficient in that the charge is "so general in nature that the accused is not given a fair and reasonable opportunity to prepare his defense," a bill of particulars may provide the necessary details of the offense. *State v. Ensman*, 77 Ohio App.3d 701, 603 N.E.2d 303 (1991). *See also State v. Gingell*, 7 Ohio App.3d 364, 367, 455 N.E.2d 1066, 1070-1071 (1982) and cases cited therein. It is thus apparent that in Ohio, an indictment may be "legally sufficient" while at the same time constitutionally deficient. Theoretically, a bill of particulars may cure this constitutional deficiency.

Yet in the same breath, Ohio cases hold that a bill of particulars may not be used to cure "fundamental defects" in an indictment. *State v. Gingell, supra*. Further, whether or not the bill of particulars serves its purported

purpose of providing the constitutionally required detail to a criminal charge is left to the sound discretion of the trial judge. *State v. Gingell, supra; State v. Clay,* 29 Ohio App.2d 206, 280 N.E.2d 385 (1972). Clearly, whether or not a bill of particulars remedies the constitutional defects in an indictment cannot be left solely to the discretion of the trial court, to be reviewed only for an abuse of discretion.

In *Schad v. Arizona,* ___ U.S. ___, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), this Court recognized that "it is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be *ranked as fundamental* [citation] that no person may be punished criminally save upon proof of some *specific* illegal conduct. *Id.*, 111 S.Ct. at 2497 (emphasis supplied) (citation and quotation marks omitted). "[O]ur vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice. . . . " *Id.*, 111 S.Ct. at 2498, fn. 4. *See also Sheppard v. Rees,* 909 F.2d 1234 (9th Cir. 1989) (Fundamental error that accused not informed of nature of accusation prior to trial, not subject to harmless error review).

Here, the trial court specifically found that the indictment, supplemented by both the first and amended bills of particulars was constitutionally deficient in apprising Mr. Lewis of the nature of the charge against him. As such, the final bill of particulars was constitutionally mandated to insure Mr. Lewis' fundamental rights. This clearly removed any discretion that the trial court purportedly had to order the final bill of particulars. However, the second amended bill of particulars was less informative than the first two inasmuch as it alleged only

"deception" which under Ohio law is an intentionally vague term. The United States Constitution deprived the trial court of the discretion to deny Mr. Lewis' request to be informed of the nature of the charges against him. The Ohio Court of Appeals was required to give deference to the Constitution rather than review the trial court's decision under only an abuse of discretion standard of review. *Schad v. Arizona, supra.*

Because of the low threshold necessary to satisfy an abuse of discretion standard, in Ohio, Federal Constitutional claims of vagueness are not given the searching scrutiny required by this Court and the Constitution.

B. BY MERELY ALLEGING THEFT BY "DECEPTION," THE STATE OF OHIO FAILED TO PROVIDE MR. LEWIS OF THE NATURE OF THE ACCUSATION AGAINST HIM

The Ohio Court of Appeals incorrectly held that "[t]he bill of particulars clarified the mode by which appellant allegedly deprived Shepherd of her money; namely, by deception." App. 6. In fact, alleging deception, especially as that term is defined by Ohio, does not clarify the accusation at all.

Ohio defines "deception" as:

> knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, *or by any other conduct, act, or omission* that creates, confirms, or perpetuates a false impression in another, including a false impression as to law,

> value, state of mind, or other objective or subjective fact.

R.C. § 2913.01(A) (emphasis supplied). In the Committee Comment to H11, the Committee specifically explained its intention to encompass an unlimited and unspecified range of conduct in defining deception:

> The definition of "deception" adopts a broad concept of deceit, framed in terms not only of acts or omissions but also of results. The essence of deception is an act or omission which the actor is consciously aware creates or perpetuates a false impression in another. If the act involved is a representation, it need not be totally false – it may merely be misleading. In addition, the acts of withholding, or preventing another from getting information are specifically included in the definition. Thus, a person need not actually make a representation to practice deception. It is enough if he merely prevents another, by whatever means, from learning the true facts, and thereby knowingly deceives him.

In the comments on Ohio's theft statute, R.C. § 2913.02, the Committee noted:

> This section covers a plethora of former offenses of which the gist was larceny, embezzlement, conversion, fraud, or false pretense. . . . This section also includes theft by deception, formerly the subject of section 2907.21, larceny by trick, as well as a long list of former statutes of which some variety of fraud or false pretense was an element.

Thus it is clear that by design, the word "deception" is a broad, generic term, encompassing a multitude of acts,

formerly prohibited by a long list of more specific statutes.

Over thirty years ago, this Court condemned the practice of charging a defendant in generic terms in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), holding:

> It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, – it must descend to particulars. [citation]. An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute. [citation]. In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. [citation]. Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. [citations]. . . .
>
> [The omission of specific facts and circumstances] is thus the violation of the basic principle that the accused must be apprised by the indictment with reasonable certainty, of the

> nature of the accusation against him. [citation]. A cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. . . .

Id. at 765-766, 82 S.Ct. at 1047-1048 (internal citations, quotations, and ellipses omitted). *See also United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (indictment must provide notice of charges to be defended against); *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) (indictment must allege offense with accuracy to enable defendant to plead former jeopardy). Here, the Ohio Courts have completely ignored this mandate.

The fact that the term deception fails to apprise a defendant of the nature of the charge against him is most notably demonstrated by the State of Ohio's various different arguments advancing Mr. Lewis' guilt. The State of Ohio argued at different times, that the evidence was sufficient to support the conviction based upon many separate and distinct, and in some cases mutually exclusive, theories of deception. *See* fn. 9 and fn. 10, *supra*. Different theories of guilt were advanced at the end of trial than those advanced at the beginning. Yet other theories were advanced on appeal. The trial and appellate courts affirmed based upon yet other theories of guilt.

In *Russell*, this Court condemned the exact practice used to convict Mr. Lewis. Using defendant Price's conviction as an example, the Court held:

> Price was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the topic under subcommittee inquiry. At every

> stage of the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

Russell at 768, 82 S.Ct. at 1049.

For example, the State's initial theory was that Mr. Lewis obtained money illegally by charging Frances Shepherd for services not rendered. Petitioner defended against the State's accusation by demonstrating that he had provided services for Ms. Shepherd, and that Ms. Shepherd did indeed desire for him to have the money he had received from her. The State of Ohio then "shifted its theory of criminality" claiming that the deception was *not* in securing payment for services not rendered, but rather deceiving Ms. Shepherd into believing these services were necessary, a form of deception never alleged at any point prior to trial.

An accusation which allows a prosecution to shift its theory of guilt mid or post trial is directly prohibited by the Sixth Amendment to the United States Constitution and this Court's precedent in *Russell, supra*. This Court should grant Mr. Lewis' writ on his behalf and on the behalf of others similarly situated, and declare the current Ohio practice unconstitutional.

VI. CONCLUSION

WHEREFORE; petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeal for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

Respectfully submitted,

RICHARD KAMMEN
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
(317) 236-0400
Counsel of Record for
Gary D. Lewis

No. _____

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari
To The Ohio Court Of Appeals For Allen County,
Third Appellate District

APPENDIX

COURT OF APPEALS
ALLEN COUNTY, OHIO
THIRD APPELLATE DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE CASE NO. 1-92-42

v.

GARY D. LEWIS OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: January 7, 1993

ATTORNEYS:

MESSRS. MCCLURE, MCCLURE & KAMMEN
Mr. Richard Kammen
Indiana Bar No. 5064-49
Attorney at Law
235 N. Delaware
Indianapolis, IN 46204
For Appellant

MS. CATHERINE D. GOLDMAN
Reg. No. 0008454
Special Prosecutor
1080 Springbrook Dr.
Mansfield, OH 44906
For Appellee

HADLEY, P.J. Defendant-Appellant, Gary D. Lewis, appeals from a judgment entry of conviction filed in the Allen County Court of Common Pleas, after a jury returned a verdict finding appellant guilty of aggravated theft, pursuant to R.C. 2913.02.

The testimony at trial elicited the following facts. Frances Shepherd ("Shepherd") became acquainted with appellant sometime prior to 1982 after appellant, in his capacity as a City of Lima police officer, responded to Shepherd's phone calls to check on her house[1]. After appellant began responding to Shepherd's phone calls, he began doing security work for Shepherd, checking on the "prowlers" when not on duty. Also, Shepherd owned numerous rental properties in Lima and Kenton, which Lewis assisted her in repairing.

During the time period beginning in 1982 through 1989, the prosecution produced checks which Shepherd wrote to appellant, a friend of appellant who was also a Lima police office – Tim Brandehoff ("Brandehoff"), Brandehoff's wife, and appellant's brother – Larry Lewis. The prosecution also produced checks which were made out to Shepherd, signed by her, and then endorsed by appellant. All of these checks amounted to over two hundred thousand dollars. Testimony indicated that the majority of the amount of checks Shepherd wrote to persons other than appellant, actually went to appellant. Appellant's theory of defense was that he received the money in

---

[1] Shepherd claimed that there were "people from New Jersey" on her roof that kept making noises. She called the Lima Police Department numerous times beginning sometime in the 1960's complaining of prowlers on her rooftop.

return for the security work and repair work he did on the rental properties, and also as gifts. Shepherd's testimony indicated that she intended and wanted to give appellant this money. She also indicated that she did not want her niece, receive any of this money.

On January 2, 1990, Shepherd was found by appellant and her niece's husband, in her home where she had fallen. Upon finding her, the niece was informed by her husband that Shepherd's home was dirty and unkempt. The niece went over to Shepherd's home during Shepherd's stay in the hospital and discovered one or more of the checks written to appellant. On January 3, 1990, Shepherd appointed appellant as her attorney in fact and signed a new will, leaving everything to appellant. Thereafter, an investigation by the Lima Police Department was initiated, culminating in a three count grand jury indictment being returned against appellant in May 1991.

On August 19, 1991, appellant moved for a bill of particulars, to which appellee responded appropriately. Appellant then moved to dismiss the indictment. Appellee filed an amended bill of particulars. Thereafter, on December 5, 1991, the trial court found that count one should not be dismissed but

> *** * * for the State to specify the date of each theft offense it alleges occurred, the capacity of the accused at the time of the alleged occurrence, and the conduct on each date which constituted the alleged offense.**

Subsequently, appellee filed a second amended bill of particulars, which stated:

* * *

> **On or about January 11, 1982, through December 19, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, Gary D. Lewis did, with purpose to deprive the owner, to wit: Frances Shepherd, of property, to wit: money, knowingly obtained or exerted control over said money by deception. The said Gary D. Lewis having committed more than one theft offense involving the following listed monies during the alleged time period in the same capacity of relationship with Frances Shepherd, to wit: friend, the aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand Dollars ($100,000): * * ***

Appellant objected to this bill of particulars and renewed its motion to dismiss count one of the indictment. However, the trial court found that this bill of particulars was sufficient.

Appellant was originally indicted on three counts. Counts two and three were dismissed at the close of the prosecution's case-in chief. Upon completion of all the evidence, the jury returned a verdict finding appellant guilty on count one of the indictment, aggravated theft. It is from this judgment entry of conviction that appellant asserts four assignments of error.

Assignment of Error No. 1

The trial court erred in overruling defendant/appellant Gary Lewis' objection to State of Ohio's second amended bill of particulars/renewed motion to dismiss Count I as the state had failed to set forth the specific 'nature and cause of the accusation' as provided by Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution.

Appellant's first assignment of error argues that the second amended bill of particulars filed by the prosecution does not provide him with sufficient specificity as to the nature and cause of the charges alleged in the indictment. We first note that appellant's assignment attacks only the bill of particulars, and not the indictment. Therefore, any discussion by appellant that the indictment did not plead an element is not relevant. A bill of particulars cannot cure defects in an indictment. *State v. Gingell* (1982), 7 Ohio App.3d 364. Rather, the purpose of the bill of particulars is merely to provide *greater detail* to the accused of the nature and cause of the charge against him, not to provide missing pieces in the indictment. *Id.*

Whether or not the bill of particulars provides greater detail to the charge contained in the indictment is a matter left to the sound discretion of the trial judge. *State v. Clay* (1972), 29 Ohio App.2d 206. Therefore, our determination is limited to whether the trial court abused its discretion in overruling appellant's objection/renewed motion to the prosecution's second amended bill of particulars. An abuse of discretion is more than an error of law or judgment; " * * * it implies that the court's attitude

is unreasonable, arbitrary or unconscionable." *Tinkham v. Groveport-Madison Local School District* (1991), 77 Ohio App.3d 242, 250.

Based upon a review of the indictment and the second amended bill of particulars, we find that the trial court did not abuse its discretion in overruling appellant's objection/renewed motion to the prosecution's second amended bill of particulars. The bill of particulars clarified the mode by which appellant allegedly deprived Shepherd of her money; namely, by deception. Also, it defined the precise relationship alleged between appellant and Shepherd; namely, that appellant deceived Shepherd in his capacity as a friend. Furthermore, the second amended bill of particulars listed each check, the date it was written, to whom it was written, and the amount of each check that the prosecution alleged was involved in the bringing of the charges against appellant.

The indictment differed from the bill of particulars, in that it alleged theft, pursuant to R.C. 2913.02(A), by possibly any of the four ways to commit theft[2]. Also, it stated that the alleged theft was committed in appellant's capacity as employee, friend and/or lover. Finally, no checks or information contained in such checks were made part of the indictment. Therefore, based upon the additional information contained in the bill of particulars and the narrowing of the precise allegations against appellant, we find that the trial court did not abuse its discretion in overruling appellant's objection/renewed

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[2] R.C. 2913.02 states that theft can be committed by failing to have consent of the owner over the owner's property, by exceeding one's scope of authority, by deception, or by threat.

motion to the prosecution second amended bill or particulars.

Assignment of Error No. 2

The trial court erred in denying defendant/appellant Gary Lewis' motion for acquittal as to Count I at the close of the state's case and again at the close of all the evidence because there was no evidence to prove beyond a reasonable doubt that Mr. Lewis was guilty of theft by deception[.]

It is well-established by Ohio law that a court will not grant a motion for acquittal, pursuant to Crim.R. 29(A), when the evidence presented is such that reasonable minds could reach different conclusions as to whether each material element of the crime had been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In reviewing the trial court's ruling on this motion, we must view the evidence in a light most favorable to the state. *State v. Wolfe* (1988) 51 Ohio App.3d 215.

Therefore, to determine whether there was sufficient evidence presented on each material element of the crime for which appellant was found guilty, we must review the elements of aggravated theft. R.C. 2913.02 states, in pertinent part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

* * *

(3) By deception;

* * *

"Deception" as defined in R.C. 2913.01, as applied to R.C. 2913.02, states, in pertinent part:

> **(A) 'Deception' means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission which creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.**

Based upon a review of the record, we find that the trial court properly denied appellant's motion for acquittal at the close of the state's case-in-chief and the close of all the evidence. Appellant argues in his brief that the element upon which the state provided no evidence was that of deception, and thus, his motion for acquittal should have been granted. As appellant has chosen to address this element only, we also will address only this element.

First, there was evidence presented at trial that Shepherd thought "people from New Jersey" were on her roof making noises and trying to scare her. There was no evidence that anyone was ever on her roof. There is also evidence that appellant would threaten these people, scare them away, and watch her roof from a distance to check on the people from New Jersey. By such action and omission, reasonable minds could conclude that appellant was confirming and/or perpetuating a false impression

of Shepherd's, which is deception, pursuant to R.C. 2913.01(A).

Secondly, evidence was presented that there were checks made out to Shepherd, and signed by her, and then endorsed by appellant and deposited into his own account, without Shepherd's knowledge. By such action, reasonable minds could conclude that appellant was withholding information from Shepherd, which again is deception, pursuant to R.C. 2913.01(A).

Appellant argues that this case is similar to *State v. Baumgarden* (1988), 49 Ohio App.3d 24. We do not agree. In *Baumgarden*, the court of appeals ruled that defendant could not have been convicted of theft by deception because the checks allegedly obtained by defendant by deception were available for his employer's review when the employer's bank would return the canceled checks each month. Herein, appellant argues that he can not be convicted of theft by deception because the checks allegedly obtained by deception were available for Shepherd's review. The matter *sub judice* differs from *Baumgarden*. Herein, there was evidence presented that Shepherd was diagnosed with Alzheimer's in approximately 1983 and also expert testimony that Shepherd was experiencing "dementia senile type", which impairs one's memory in 1990. Based on this difference between *Baumgarden* and the facts herein, we find it likely that reasonable minds could conclude, based upon the competent, credible evidence presented, that appellant had been deceptive with Shepherd.

For the above stated reasons, we find that the trial court did not err in overruling appellant's motion for

acquittal. Therefore, this assignment of error is without merit.

Assignment of Error No. 3

The trial court erred in failing to review the grand jury transcript, in camera and in the presence of counsel, to determine whether inconsistencies or exculpatory statements were contained therein.

Appellant argues that the trial court should have permitted him to review or produce the grand jury testimony of three witnesses; namely, Fran Johns, Larry Lewis, and Leon Campbell.

The availability of grand jury testimony is permitted pursuant to Crim.R. 6(E), but, such availability is limited to circumstances where the defense can demonstrate a "particularized need" for such disclosure. *State v. Greer* (1981), 66 Ohio St.2d 139.

> **2. Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy. * * ***
>
> **3. Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony.**

Id. at paragraph two and three of the syllabus.

Considering a review of appellant's argument and the relevant portions of the trial transcript, we find that appellant did not demonstrate a "particularized need" for disclosure which outweighs the need to preserve the secrecy of the grand jury testimony. We first note that appellant's only reason for requesting the grand jury testimony was that these witnesses were all key state witnesses. However, this does not constitute a "particularized need." Not only has appellant not presented a particularized need for the grand jury transcripts, but also there is no evidence that any of the witnesses he requested grand jury transcripts on presented any "surprise" evidence nor did any of them become contradictory with appellant's counsel during trial over the relevant allegations in issue.

Moreover, we do not agree with appellant's assertion that the facts in this matter are similar to the facts in *Dennis v. United States* (1966), 384 U.S. 855. In *Dennis*, there was a considerable amount of time that elapsed not only between the events alleged in the indictment, but also between the time of the grand jury proceedings and the trial. Herein, less than a year elapsed between the grand jury proceedings and the time of the trial. The charge could not have been proven without the witnesses whose grand jury testimony was sought in *Dennis;* whereas, herein, there was corroboration of the relevant matter testified to by the three witnesses whose grand jury testimony was sought. Finally, the testimony of the witnesses in *Dennis* was largely uncorroborated. Herein, the three witnesses' testimony was corroborated by other state witnesses.

Because appellant failed to show a particularized need to review the grand jury testimony of the three witnesses, this assignment of error is without merit.

Assignment of Error No. 4

The trial court erred in overruling defendant/appellant Gary Lewis' motion for a change of venue and motion for a new trial based upon the denial of a change of venue as Mr. Lewis demonstrated that he would not and did not receive a trial before a fair and impartial jury.

Appellant argues that there was not a fair and impartial jury determining the outcome of his trial based upon the pretrial publicity. Crim.R. 18(B) permits a court to transfer any action before it outside the county in which the trial is to be held when the trial court believes that the defendant cannot receive a fair and impartial trial. Whether or not venue should be transferred is a matter left to the sound discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239. An appellate court should not disturb the trial court's ruling on this matter " ' * * * unless it is clearly shown that the trial had abused its discretion. * * * ' " *Id.* at 250.

> **It has long been the rule in Ohio that '[t]he examination of jurors on their *voir dire* affords the best test as to whether prejudice exists in the community against the defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in**

> **absence of a clear showing of an abuse of discretion.' [Citation omitted.]**

Id. at 250-251. We have reviewed the record of the *voir dire* examination of the prospective jurors in this case and conclude that the trial court did not abuse its discretion in overruling appellant's motion for a change of venue.

First, the record indicates that the jurors felt that despite their exposure to the media accounts regarding appellant's case, if any, they could be fair and impartial and listen to all of the evidence before making a decision. Secondly, we find important, as did the Ohio Supreme Court in *Maurer, supra,* and this court in *State v. Booher* (1988), 54 Ohio App.3d 1, that appellant failed to utilize all of his peremptory challenges that were available to him. Appellant argues that he was choosing between the "lesser of two evils" in not exercising his remaining peremptory challenges. It cannot be predicted who would have become jurors if appellant had exercised all of his peremptory challenges', what the outcome would have been if the prosecution exercised its remaining peremptory challenge, if at all; or, whether any peremptory challenges would have been utilized with an alternate juror(s). Therefore, as this court noted in *Booher,* appellant must have been satisfied with the jury as seated if he failed to exhaust all of his peremptory challenges.

This assignment of error is overruled.

Judgment affirmed.

EVANS and BRYANT, JJ., concur.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

STATE OF OHIO PLAINTIFF-APPELLEE v. GARY D. LEWIS DEFENDANT-APPELLANT	:	CASE NO. 1-92-42 JOURNAL ENTRY

For the reasons stated in the opinion of this Court rendered herein on January 7, 1993, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the Court of Common Pleas of Allen County is affirmed at the costs of the appellant for which judgment is rendered.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

/s/ Ronald E. Hadley
/s/ John R. Evans
/s/ Illegible
JUDGES

DATED: January 7, 1993

THE SUPREME COURT OF OHIO

1993 TERM

To wit: June 2, 1993

State of Ohio,	:	
Appellee,	:	Case No. 93-447
v.	:	ENTRY
Gary Lewis,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Allen County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Richard Kammen.

(Court of Appeals No. 19242)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

To wit: July 14, 1993

State of Ohio, Appellee,	:	Case No. 93-447
v.	:	REHEARING ENTRY
Gary Lewis, Appellant.	:	(Allen County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 19242)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS,
ALLEN COUNTY, OHIO

STATE OF OHIO
Plaintiff

-vs-

GARY D. LEWIS
Defendant

CASE NO.
CR91 05 0190

JUDGMENT ENTRY OF CONVICTION

INDICTMENT FOR:

COUNT 1 - AGGRAVATED THEFT, felony 2, R.C. 2913.02;
COUNT 2 - SECURING WRITINGS BY DECEPTION, felony 4, R.C. 2913.43;
COUNT 3 - GRAND THEFT, felony 4, R.C. 2913.02;

This 30th day of May, 1991, Defendant personally present in open Court unrepresented by counsel; State of Ohio represented by John W. Allen, Special Prosecuting Attorney. Defendant acknowledged service of a copy of the indictment; waived the reading thereof; waived any statutory waiting period and tendered a plea of NOT GUILTY to the charges contained in the indictment.

This 13th day of January, 1992, defendant personally present in open Court with Attorneys Richard Kammen and Richard T. Reese; State of Ohio represented by Special Prosecuting Attorney John W. Allen and Assistant Prosecuting Attorney Cathy Goldman. Thereupon came

the following named persons who were duly impaneled and sworn, to-wit:

Pansy Gales	Charles F. Barga
Rohonda K. Redmond	Mary L. Weber
Robert O. Stoody	Sue K. Bowman
Larry M. Huber	Christina K. Lause
Julie M. Lee	Susan M. Middlemiss
Sondra J. Heidlebaugh	Kathleen S. Croy

ALTERNATES: Daniel E. Spicer
James F. Carmichael

Court recessed until the following day.

This 15th day of January, 1992, Court reconvened as the trial was continued on the 14th day of January, 1992 due to a snow and ice storm. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Opening statement made on behalf of the State of Ohio and on behalf of the defendant. Evidence was presented on behalf of the State of Ohio. Court recessed until the following day.

This 16th day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed until the following day.

This 17th day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed

for the day and advised the jury to next appear on Tuesday, January 21, 1992.

This 21st day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed until the following day.

This 22nd day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. The State of Ohio then rested its case. Whereupon, counsel for the defendant moved the Court for a verdict of acquittal as to all three counts contained in the indictment. The Court sustained the Motion for a Directed Verdict of Acquittal as to Counts Two and Three contained in the indictment, and overruled the Motion for a Directed Verdict of Acquittal as to Count One contained in the indictment. Evidence was presented on behalf of the defendant as to Count One. Court recessed until the following day.

This 23rd day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the defendant. The defense then rested its case. The Motion for a Directed Verdict of Acquittal as to Count One was renewed by Mr. Kammen, Attorney for the defendant, and the same was taken under advisement by the Court. Final arguments were

presented by the State of Ohio and the defense. Whereupon, the Court charged the jury, and the jury retired for deliberation purposes. The Court, after being advised by the jury they would like to recess for the day, granted that request and Court recessed for the day. The jury was sequestered as a body under the direction and control of the Bailiff.

This 24th day of January, 1992, the jury commenced with their deliberations. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman.

Whereupon, on this 24th day of January, 1992, came the said jury, conducted into open Court by the bailiff. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. The said jury returned its verdict, signed by all twelve jurors, to-wit:

> "We, the jury in this case, duly impaneled and sworn and affirmed, find the defendant, GARY D. LEWIS, GUILTY of theft by deception.
>
> DATED: January 24, 1992.
>
> We, the jury in this case, further find that the value of the property involved was MORE than $100,000.00.
>
> DATED: January 24, 1992."

At the request of defense counsel the jury was polled as to their verdict in open Court. The jury was then released from any admonitions previously given by the

Court and were discharged from further jury service in this matter.

The Court ordered a Pre-sentence Investigation Report be conducted by the Adult Parole Authority. The matter of sentencing is hereby continued to Monday, March 23, 1992 at 9:00 A.M. Bond is continued.

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
Richard Kammen
Richard Reese
Adult Parole Authority

IN THE COURT OF COMMON PLEAS
ALLEN COUNTY, OHIO

STATE OF OHIO PLAINTIFF	CASE NO. CR91 05 0190
-VS-	MEMORANDUM DECISION ON
GARY D. LEWIS DEFENDANT	SENTENCING

This matter is before the Court for sentencing of the defendant who has been found guilty of aggravated theft after a jury trial. This case has challenged the Court to review its own philosophy of sentencing in light of factual matters which the Court concludes are unique to its experience and the Court suspects, in the experiences of many other trial judges.

In preparing for the sentencing the Court has reviewed all of its trial notes to refresh its memory relative to the evidence presented. The Court has also again reviewed the defendant's testimony presented to the grand jury on May 21, 1991 and unsealed and presented to the Court as evidence at a motion to suppress on January 9, 1992. In addition, the Court has reviewed the exhibits admitted into evidence during the trial.

As has been noted in the record a pre-sentence investigation was ordered, received and extensively reviewed by the Court. Pursuant to R.C. 2951.03 the Court obtained a forensic evaluation of the defendant for assistance in assessing appropriate mitigating factors, both past and present. The Court has also read and, accepted the comments to the degree appropriate, the numerous letters

supplied the Court by defense counsel from the various friends, family and associates of the defendant.

As per the Court Order of February 13, 1992, each party has submitted its brief and argument relative to restitution. These have been considered and the Court appreciates counsels' assistance.

Finally, the Court has taken into account the arguments of counsel today, the defendant's statement on his own behalf, and the letter defendant forwarded the Court through the U.S. Mail and received March 18, 1992.

All of these matters have been reviewed for the sole and express purpose of determining a just and fair sentence to be imposed upon the defendant under the criteria provided in R.C. 2951.02, both for and against probation and suspension of sentence.

Specifically, the Court finds that in the mid-1970's a relationship developed with Mrs. Shepherd who can best be characterized as a cantankerous, strong-willed elderly lady and the defendant who was a Lima Police Officer who showed concern for her situation. Because the defendant "tolerated" Mrs. Shepherd and her eccentricities better than other officers, the defendant became a "primary" responder to her frequent prowler calls to Lima Police Department. The scenario is corroborated by comments from supervisors and other officers. The defendant commenced doing odd jobs for Mrs. Shepherd such as yard work and home repairs.

As testified to by retired Police Inspector Campbell, there is no prohibition against a Lima Police Department officer doing off duty work of any kind he chooses, as

long as it is not in conflict with police duties. Without directly reflecting on the propriety of police officers using "on duty" contacts to obtain "off duty" work, the lack of a policy in the instant case led to the defendant purportedly providing Mrs. Shepherd privately with services, i.e, watching her house, checking for prowlers, etc., which are police responsibilities if, in actuality, a problem exists. An argument could be made that because of defendant's activity the Lima Police Department was no longer "bothered" by the victim.

During this period the defendant observed what he perceived to be inappropriate police officer conduct including officers soliciting gifts from businesses, officers misreporting theft offenses to permit victims to increase insurance claims, officers concealing personal funds from spouses in divorce actions, and officers routinely working for people who became introduced to the officer through "on duty" activity. The defendant was unsuccessful in his attempt to do anything about these issues from his point of view, but the defendant believes they were real. In this Court's opinion, the defendant perceived this as an institutional attitude and this institutional attitude formed the basis for defendant's belief that his conduct was appropriate. To use a cliche, it became: "no harm, no foul."

By the early 1980's Mrs. Shepherd became more demanding of defendant's time and effort and monetary remuneration increased and became more frequent. The evidence indicates to the Court that defendant commenced his deceptive conduct in his relationship with Mrs. Shepherd at this time. The Court finds, based on the evidence, that the deception occurred by playing directly

on and exacerbating Mrs. Shepherd's paranoia of her niece and others to obtain money.

It is uncontroverted in this case that the defendant claimed to be providing surveillance and/or security assistance to Mrs. Shepherd. The deception, in this Court's opinion, lies in the fact that the defendant fostered the belief with Mrs. Shepherd that such assistance was necessary. The evidence is clear that Mrs. Shepherd had no real need for surveillance and/or security assistance. Defendant perpetuated the belief to the point that Mrs. Shepherd became totally dependent upon him and was calling defendant every day or his designee in defendant's absence several times a week for assistance.

What the Court finds persuasive indicia of defendant's guilty knowledge is the methodology employed by defendant to receive the funds through 1989. The evidence reflects that from 1982 through 1989, $58,000.00 was conveyed to defendant through third persons, i.e. Larry Lewis, James Lewis, Tim Brandehoff and Diane Brandehoff. The total loss claimed for this same period is approximately $210,000.00. Therefore, 28% of the claimed loss passed through third parties. The obvious question is why?

Defendant tenders an explanation through his own statement and by his statements to others that Mrs. Shepherd wanted it this way to avoid her niece learning of the disbursements. Such an explanation lacks foundation since, if the niece were concerned, she would be just as concerned about any unknown person receiving large sums of money without explanation.

In addition, the defendant in his grand jury testimony insists the funds he received, even through third parties, was money he then paid over to others for work the others were performing on Mrs. Shepherd's real estate holdings. This explanation also lacks substance since all of the evidence indicates the defendant is a good, sound businessman in regards to his personal investments and yet all of the alleged transactions with workers were in cash without any receipts or other records. None of Mrs. Shepherd's records indicate such payments to the defendant or third parties, and none of the workers have been identified.

Neither explanation is credible to the Court and both explanations exemplify the enhancement of the deception to reduce potential outside knowledge and interference.

The checks involving third-party payees are substantial beginning in 1984 and are as follows:

YEAR	PAYEE	# CHECKS	AMOUNT
1984	Diane Brandehoff	4	$ 5,233.00
	Tim Brandehoff	2	$ 1,950.00
	James Lewis	1	$ 2,061.00
	Larry Lewis	1	$ 1,068.00
1985	Tim Brandehoff	4	$10,312.00
1986	Tim Brandehoff	3	$14,232.00
1987	Tim Brandehoff	5	$12,466.00
1988	Tim Brandehoff	3	$ 5,000.00
1989	Tim Brandehoff	1	$ 2,000.00
		TOTAL	$54,322.00

The third position presented by defendant as to the money, is in the context of gift. This is an explanation which was tendered but like with the others, is lacking of specifics. Unfortunately, neither counsel inquired of Mrs. Shepherd when deposing her about gifts made to defendant and her method of making the gifts. For this reason the Court finds that the checks issued directly to defendant between 1983 and 1989 in the sum of $81,802.00 may have been gifts in the sense the funds passed from a donor to a donee. Therefore this Court will accept for purposes of this hearing that the funds paid directly in the defendant's name are not subject to recovery through these proceedings.

An analysis of 1987-89 reflects an additional deceptive pattern or scheme to obtain funds by the defendant depositing in his own account checks payable to Frances Shepherd or Wharton. These were endorsed by Frances Shepherd with defendant's co-endorsement. Mrs. Shepherd did testify on this point and specifically denies such a practice and states she would not do business in that manner. These checks are broken down as follows:

YEAR	PAYEE	# CHECKS	AMOUNT
1987	Frances/Wharton	12	$ 4,144.00
1988	Frances/Wharton	66	$27,962.00
1989	Frances/Wharton	34	$15,982.00
	Frances Shepherd	2	$22,253.00
		TOTAL	$70,341.00

These drafts all represent rent, interest, or C.D. funds.

While rarely verbalized, the Court notes that in reviewing the criteria presented in R.C. 2951.02, they are a canonization of how to apply common sense to the sentencing process. In the case at bar, the Court concludes the following:

(1) this defendant did not contemplate that his actions were criminal in nature nor that his conduct would result in harm to Mrs. Shepherd;

(2) that while the aggregate activity of the defendant over a time period of eight years was criminal, such circumstances are unlikely to recur;

(3) the victim of the criminal conduct facilitated the defendant's activity to the degree that she, through her own shrewd and cunning behavior, precipitated a circumstance which enabled the defendant to carry out his criminal activity;

(4) there are substantial grounds tending to excuse the offense even though these grounds are insufficient to establish a defense when the Court considers such factors as the relationship of the defendant to the victim; the unique behavior of the victim with all third parties; and the willingness of the victim, regardless of motive, to disperse funds to the defendant through third parties;

(5) the defendant has no criminal history of any kind and has a 21 year employment record as a police officer, which has been characterized by his past supervisors and peers as dedicated;

(6) the defendant demonstrated his dedication as a family man, whose spouse and children have been and will continue to be supportive of him;

(7) the defendant, the Court is confident, would respond affirmatively to any Court imposed treatment;

(8) the defendant has the ability to make restitution for the loss sustained by Mrs. Shepherd;

(9) penal incarceration, because of defendant's past activity as a police officer, will entail undue hardship and danger to the defendant, which is not outweighed by any need to protect the victim or society as a whole from further criminal conduct by the defendant; and

(10) that the victim's age and emotional dependency upon the defendant is not a factor to be considered against probation in light of all of the surrounding circumstances.

In arriving at these various conclusions and particularly in light of very impressive letters submitted by Jack Griesdorn, Mike DeVita, Mike Keith and Clyde Breitigan I want to reiterate the Court's strong affirmation for the jury system. Each of the officers noted above acknowledge his understanding that the jury has spoken and the jury, not he, heard all the evidence before rendering a verdict. Let there be no mistake about it, our system has its deficiencies, but even with those deficiencies it is the fairest and most just system in the world. It is the system which reiterates that no one, regardless of race,

status, or occupation is above the law and therefore unanwerable [sic] for his or her acts.

It is important that a defendant separate the issue of guilt from the issue of punishment or sentencing. In this case the defendant has failed to accept that the totality of the circumstances dictate a finding that he wrongfully took an elderly lady's money by deceptive means. Until the defendant accepts this activity was wrong by societal standards he will never be able to get his life back together and proceed forward. The Court hopes this can be accomplished by the defendant at this time and he stops blaming others for his circumstance. To approach this problem in any other manner is counter-productive and futile.

Based upon all of the foregoing, the Court orders that the defendant be sentenced to a term of imprisonment of not less than 3 nor more than 15 years at the Ohio Department of Rehabilitation and Corrections; fined the sum of $5,000.00; and, charged the costs of prosecution. The defendant is ordered to make restitution to Frances Shepherd in the sum of $124,663.00.

The term of incarceration shall be suspended and the defendant shall be placed on four (4) years probation with the Adult Parole Authority on the following conditions: (1)that the restitution order be satisfied on or before September 1, 1992; (2)that the fine be paid on or before June 1, 1992; (3)that the court costs be paid on or before May 1, 1992; (4)that the defendant complete 240 hours of community service at a Court approved placement; and (5)that the defendant follow all other terms of probation established by his probation officer.

IN THE COURT OF COMMON PLEAS,
ALLEN COUNTY, OHIO

STATE OF OHIO Plaintiff	CASE NO. CR91 05 0190
-vs-	JUDGMENT ENTRY ON SENTENCING (PROBATION GRANTED)
GARY D. LEWIS Defendant	

This 23rd day of March, 1992, sentencing had with the State represented by the Prosecuting Attorney, and the Defendant represented by Richard Kammen and Richard Reese was brought into open Court in person for the purpose of having the sentence of the law pronounced in accordance with the judgment of conviction entered against the Defendant on January 27, 1992. Thereupon the Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and the Defendant was given an opportunity to present mitigation. Whereupon the Court proceeded, in the presence of the Defendant, to pronounce sentence against him as follows.

It is ORDERED by the Court that the Defendant, GARY D. LEWIS, who has been adjudged to be GUILTY of the offense of:

COUNT 1 - AGGRAVATED THEFT, felony 2, R.C. 2913.02;

be, and hereby is sentenced to confinement in the Ohio Department of Rehabilitations and Corrections for the following terms:

NOT LESS THAN 3 NOR MORE THAN 15 YEARS; FINED THE SUM OF $5,000.00 AND IS

TO PAY RESTITUTION IN THE AMOUNT OF $124,663.00 TO FRANCES SHEPHERD. THE SAID TERM OF CONFINEMENT IS HEREBY SUSPENDED ON THE FOLLOWING CONDITIONS –

State of Ohio to recover from said Defendant all costs of this prosecution, for which execution may issue against the property of said Defendant.

Further, Defendant is placed on probation with the Adult Parole Authority for 4 years on the following conditions:

THE RESTITUTION SHALL BE PAID IN FULL BY SEPTEMBER 1, 1992 AND ALL PAYMENTS TO BE MADE THROUGH THE CLERK OF COURTS OFFICE; THE FINE SHALL BE PAID IN FULL BY JUNE 1, 1992; COMPLETE 240 HOURS OF COMMUNITY SERVICE AT A COURT-APPROVED PLACEMENT; ABIDE BY ALL OTHER TERMS OF PROBATION AS SET BY PROBATION DEPARTMENT. DEFENDANT TO PAY COURT COSTS BY MAY 1, 1992. BOND IS ORDERED DISCHARGED AND APPLIED TO COSTS, FINE AND RESTITUTION.

Further, the defendant was advised of his appellate rights pursuant to Criminal Rule 32 (A)(2). An appeal bond is set in the amount of $10,000.00 cash. Defendant to be released from custody forthwith.

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO
PLAINTIFF,
-VS-
GARY D. LEWIS
DEFENDANT.

CASE NO.
CR91 05 0190
ORDER

This matter came on to be heard upon defendant's motion to dismiss filed December 11, 1991 (Doc. No. 94), December 17, 1991 (Doc. No. 106 and 107) and December 20, 1991 (Doc. No. 119). Based upon consideration of the same the Court finds said motions not well taken and therefore overruled.

The issues raised by defendant in each of his respective motions cannot be determined by the Court on a pretrial basis. It is alleged by the State in its Second Amended Bill of Particulars that the defendant committed theft by " . . . knowingly obtained or exerted control over said money hy deception . . . " in " . . . the same capacity of (sic) relationship with Francis Shepherd, to wit: friend. . . . " Defendant is not entitled to a dismissal.

IT IS SO ORDERED.

DATED: December 30, 1991

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
John W. Allen
Richard Kammen
Richard T. Reese

Supreme Court, U.S.
FILED
DEC - 1 1993
OFFICE OF THE CLERK

No. 93-580

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For Allen County, Third Appellate District

BRIEF IN OPPOSITION

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Statement of the Case

Petitioner was charged in a three count indictment with various theft offenses. Respondent was granted directed verdicts on the second and third counts. T. at 1454-1459.[1] The first count alleged that petitioner

> from on or about the 11th day of January, 1982 to on or about the 5th day of December 1989 . . . with purpose to deprive the owner, to-wit: Frances M. Shepard of property, to-wit: money in that he did knowingly obtain or exert control over said property without the consent of Frances M. Shepard and/or beyond the scope of the express or implied consent of Frances M. Shepard and/or by deception. The said Gary D. Lewis having committed more than one theft offense during the given span of time in the same capacity or relationship . . . to-wit: employee and/or friend and/or lover. The aggregated value . . . being in excess of $100,000. . . .

Petitioner moved for a bill of particulars which was furnished. In the bill respondent referred to 87 exhibits, principally checks, furnished as part of discovery. Respondent alleged in the bill that petitioner alternatively "beyond the express or complied [sic] consent of Frances M. Shepard, or by deception" exerted control over her property. The charge included two subsections of the Ohio theft statute.

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[1] References to the trial transcript will be by "T. at ___." References to filings with the Clerk will by docket entry "T.d. at ___." References to the video transcript of Frances Shepard will be by "T.v. at ___."

Petitioner moved to dismiss alleging that Ohio's theft by deception statute only provided for alternative, not conjunctive liability, among its subsections and that the prosecution could only aggregate offenses in any one status, ie. friend, or lover, not friend and lover.

The trial court ruled on the motion to dismiss that the state could only aggregate crimes involving theft in the same relationship. The Court ordered respondent to amend the bill of particulars to aver the capacity of the petitioner for each occurrence. T.d. 0086.

Respondent furnished a second amended bill of particulars, abandoning allegations of theft by lack of consent, and enumerating 191 thefts by deception, mainly by check, in petitioner's relationship as "friend" to the victim. Petitioner renewed his motion to dismiss, which the trial court overruled, finding that the capacity was now singular, "friend," and that the prosecution had limited its case to one subsection of the theft statute, the subsection prohibiting theft by deception. T.d. 0116.

At trial the evidence indicated that petitioner was a police officer, married, with children in college. The victim, Frances Shepard, in 1990 was a 92-year-old recluse. T. at 951, 1277-1293.

On January 2, 1990, Frances Shepard was found at home, delirious and in pain with a broken hip, by her niece's husband. T. at 463. Although it was winter, flies were in the house, decaying food was in the sink, and dog feces was in the rooms. T. at 464-66. While in the house, her niece found checks written to petitioner and various love letters from petitioner. T. at 701, 707.

The next day petitioner had a power of attorney and will prepared, naming him as the attorney-in-fact and the sole testamentary beneficiary. T. at 745-754. These were executed at the hospital.

While in the hospital Frances Shepard was diagnosed by a psychologist and a psychiatrist as being in the middle stages of progressive dementia. T. at 951, 1277-1293.

When Frances Shepard was interviewed by police inspector, Leon Campbell, she told him the petitioner did security work at her house. He would go to a nearby city pump station and watch the house. T. at 952. The inspector went to the pump station and observed that it would have been next to impossible to view the house from that vantage point. She also told the inspector that petitioner had put a screen over her chimney to keep her niece and her husband from coming down the chimney and poisoning her. T. at 953. Petitioner had also "repeatedly" put roofs on her house because of people walking on her roof, for which she had repeatedly paid him. T. at 953. She also told the inspector that petitioner had asked to kiss her on three occasions, "but that they were never intimate." T. at 962.

Testifying by video tape, Frances Shepard indicated that she paid petitioner $8 per hour for work, and that she had given him a "couple extra hundred" for his children in college. T.v. at 14, 17. She was not aware how much money she had given him. T.v. at 57. Among his chores he had protected her from some people from New Jersey, who were getting into "her bathroom and making noises . . . " T.v. at 47. Petitioner had "talked to them and threatened them to go home to New Jersey." T.v. at 48.

Typical of the thefts were the incidents related by petitioner's twin brother. Petitioner had asked him to repair a brick wall for Frances Shepard. After, he did the work for $400, petitioner brought him a check for $1,060 from Frances Shepard. The brother cashed the check and gave petitioner the proceeds, keeping $400 for his work. T. at 803-804

On another occasion the petitioner brought his brother a check for $1,347 and asked him to endorse it, as petitioner said that Frances Shepard had mistakenly made it out to the brother, rather than petitioner. T. at 804-805.

Petitioner also used a fellow police officer, Timothy Brandehof and his wife, Diane. Diane Brandehof testified that her husband gave her checks from Frances Shepard for $462 and $2,970 and she cashed them. Petitioner then came by and collected the money from her and gave her $50, in his words, for "handling the money." T. at 831-35. After she met Frances Shepard she refused to accept any more money. T. at 843. When she visited, Frances Shepard's house was dirty and smelled "very strong of dog urine." T. at 845.

Timothy Brandehof, to whom most of the third party checks were written, testified that petitioner told him that petitioner told Frances Shepard that Brandehof was doing work when he was not. She would make a check out to Brandehof, who would cash it, keep $50 and give the balance to petitioner. T. at 881, 900.

During the period, petitioner wrote Frances Shepard letters, many expressing his love for her. An example is a letter from the Coco Palms Resort in Kauai, Hawaii.

> I want you to know that *I miss you* very much and I'll be glad to be back home so I can see and hold you. I hope you have missed me as much as I do you. It wont [sic] be long and I'll be there with you. Just *don't forget me. I think of you all the time* even in my sleep . . . I love you and I know you love me. . . .
>
> *love* Gary x x x
>
> GL-8

An emergency guardian had been appointed for Frances Shepard. When the guardian did an initial inventory of Frances Shepard's household, she found numerous love letters from the defendant to Frances Shepard. T. at 1151-1158. When the guardian asked Mrs. Shepard why petitioner had received the money, "she had indicated to me that Mr. Lewis was suffering from AIDS and she had given it to him to help with his AIDS medicine." T. at 1165-66.

The evidence indicated that petitioner had received $81,802 in checks to him, $57,909 in checks to third parties, and $71,254 in checks payable to Frances Shepard and endorsed to petitioner.

At the conclusion of the evidence the Court instructed the jury that

> [t]he State has alleged that Gary Lewis obtained money by deception from Frances Shepard in the relationship as a friend. Before the defendant can be found guilty the state must prove, by proof beyond a reasonable doubt, that the defendant deceived Mrs. Shepard as a friend. T. at 1770-71.

The jury found petitioner guilty of theft by deception in an amount exceeding $100,000.

Summary of the Argument

Petitioner, a police officer, stole in excess of $200,000 from a 90 year old woman by various schemes including claims of love, claims that he was protecting her from drug dealers, and claims that he was providing maintenance services for rental properties owned by her.

Petitioner was charged under three subsections of theft in the first count of his indictment. Pursuant to elections by the prosecution and by orders of the trial court, the charge was narrowed to one subsection.

Satisfying due process, the charge was specific, giving in addition to the statutory language, relevant dates, the property stolen, and the name of the victim. The jury found him guilty. A charge or indictment can repeat statutory language if the statute specifies a complete offense and contains sufficient factual detail to avoid double jeopardy

Petitioner's claim that the Ohio court of appeals applied the incorrect standard of review should not be considered as petitioner has never advocated any other specific standard.

Argument

An indictment in the words of the statute enumerating specific facts satisfies a criminal defendant's Sixth Amendment right to trial by jury and indictment by a grand jury.

The indictment was not constitutionally defective. An indictment can be in the words of the statute if the statute and the facts alleged give the defendant sufficient notice to be able to fairly defend.

Contrary to the argument of petitioner, an indictment can be in the words of the statute if the statute and the facts alleged, give the defendant sufficient notice to be able to fairly defend. An indictment must

> contain . . . the elements of the offense charged and fairly inform . . . a defendant of the charge against which he must defend, and second, enable . . . him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87 at 117 (1974).

The words of the statute can be used if " 'the words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' " *Id.* See also *Evans v. United States*, 153 U.S. 584 at 587 (1893): "an indictment for statutory misdemeanor is sufficient . . . where the words of the statute themselves . . . 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary. . . . ' "

In this case statutory language was used, enumerating each element of the offense, then additional facts were alleged. When edited as narrowed by the trial court and by respondent's response to the bill of particulars, the count alleged that

> from on or about January 11, 1982 to on or about December 5, 1989 . . . Gary D. Lewis . . . did with purpose to deprive the owner, to wit: Frances Shepard of property, to-wit: money in that he did knowingly obtain or exert control over said property without the consent of Frances M. Shepard . . . by deception . . . in the same capacity . . . to wit: friend . . . in violation of R.C. §2913.02 . . .

The count then alleged that the amount exceeded $100,000.

While the trial court required the prosecution to narrow the charge, such an election was not constitutionally mandated. The evidence indicated that petitioner used various schemes, singularly and in concert, to get money. He used his protestations of love, he falsely claimed to have done work, he used his position as a police officer to create fear, and he schemed with another police officer to extract money from Frances Shepard. Petitioner would want to require the state to prove each theft in some discrete and defined relationship, so he could then argue that the evidence indicated some other relationship and the charge was, therefore, not proven.

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire

> accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her. *Schad v. Arizona*, 501 U.S. ___, 115 L.Ed.2d 555 at 577 (1991), Scalia concurring.

Constitutionally the state only needed to prove that each theft was done by some material deception.

Petitioner seems to be angling towards an argument such as found in *Schad v. Arizona*. There defendant argued he should not be convicted when the jury was instructed that he could be found guilty of capital murder on either premeditated or felony murder grounds, and the jury need not agree on which theory. A defendant could theoretically be convicted by a less than a unanimous verdict as to any one theory. Here, however, the alternative theories were ordered abandoned by the trial judge.

Petitioner's reliance on *Russell v. United States*, 369 U.S. 749 (1962) is misplaced. In *Russell* defendants were indicted for a non-common law crime of failing to answer a question before a congressional committee. The indictment failed to specify the subject of the congressional investigation. The defendants could not determine if they were required to answer questions, unless they knew the subject of the inquiry. They could have no criminal culpability unless they knew what questions they had or could rightfully refuse to answer. Therefore when an indictment refers to other statutes or extraneous facts, the crime must be pled so as to give notice of how those statutes were violated. This is no more than fair. As this court noted in burden-shifting cases

> [w]here a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to

> demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. *Schad v. Arizona*, 501 U.S. ___, 115 L.Ed.2d 555 at 570-71.

While this is not a burden-shifting case, this case involves a crime descended from the common law. While Ohio theft by deception statute will be discussed more, *infra*, this statute is far different than the statute involved in *Russell*.

One must also note that petitioner was given liberal discovery and presented a vigorous defense. Copies of all checks and other exhibits used against him at trial were furnished to him before trial. He was given a list of witnesses. The defendant called ten witnesses on his behalf. The claims therefore that the indictment was so vague as to deprive him of his Sixth Amendment right to trial by jury and Fourteenth Amendment right to due process are without merit.

Ohio's theft by deception statute, being neither novel nor unique, is more specific than similar statutes in other states.

The Ohio statute is similar to the Model Penal Code. Respondent particularly complains about Ohio's definition of deception. A side-by-side comparison between the Model Penal Code's definition of "deceive" and Ohio's definition of "deception" reveals striking similarities.

Ohio Statute	Model Penal Code
R.C. §2913.01(A). "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation,	§223.3. A person deceives if he purposely: (1) creates or reinforces a false impression, *including false impressions as to law, value, intention or other state of mind* . . . [the italicized portion is found in the third part of the Ohio statute, also italicized, *supra*]
by withholding information, by preventing another from acquiring information,	(2) prevents another from acquiring information which would affect his judgment of a transaction; or
or by any other conduct, act, or omission that creates, confirms, or perpetuates *a false impression in another, including a false impression as to law, value, state of mind,* or other objective or subjective fact.	(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship . . . Model Penal Code (1962)

Ohio's definition of deception, therefore is not unusual, nor vague, and is nearly the same as the Model Penal Code definition.

Compared to other states the Ohio statute is a model of specificity. In Florida, for example, larceny is defined in part as occurring when "[a] person who with intent unlawfully to deprive . . . the true owner . . . (a) obtains from such person by color or aid of fraudulent or false

representation or pretense . . . " Florida Statutes Annotated §812.021. In New York the same conduct is enumerated as "[l]arceny includes a wrongful taking . . . (a) By conduct heretofore defined or known as . . . common law larceny by trick, embezzlement, or obtaining property by false pretenses." New York Penal Law §155.05. Petitioner's argument that theft by deception in Ohio is vague is without merit.

In attacking the standard of review below, petitioner never proposes an applicable standard, nor establishes that any appropriate standard was breached.

The *sine qua non* of this argument is that constitutional error took place below. Not having demonstrated any error, one does not get to this issue. While defendant argues that the Ohio court of appeals used the incorrect standard, petitioner has never set out below or before this court the standard which he proposes.

Defendant did not assert below, nor has he argued in this Court, that any other specific standard should be used albeit *de novo*, abuse of discretion, or harmless error beyond a reasonable doubt. e.g. *Chapman v. California*, 386 U.S. 18 (1967); *Sullivan v. Louisiana*, 508 U.S. ___, 124 L.Ed.2d 182 (1993). Not having argued for any standard, neither respondent nor this Court should guess or try to craft a standard which petitioner deems appropriate.

The court of appeals below in treating petitioner's assignment of error as to whether or not the trial judge should have sustained the objection to the second amended bill of particulars, used an abuse of discretion

standard. When petitioner appealed to the Ohio Supreme Court he was required to set forth the propositions of law, which he wished the Ohio Supreme Court to adopt.[2] He assigned no proposition of law pertaining to the standard of review. Respondent is therefore unable to respond other than to quote this Court that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673 at 681 (1986). Absent constitutional error, and petitioner's failure to preserve this issue below and in this Court, this issue is not presented for review.

Conclusion

The petition for certiorari should therefore be denied. No constitutional error is demonstrated. Appellant was well represented and was convicted fairly with all of the safeguards of our system of jurisprudence.

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Attorney for Respondent

Dated: December 1, 1993

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[2] Rule V. Section 1.(D) of the Ohio Supreme Court Rules of Practice provides that the brief must contain an argument "headed by the proposition of law, which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus."

APPENDIX

Model Penal Code 223.3 Theft by Deception.

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or

(2) prevents another from acquiring information which would affect his judgment of a transaction; or

(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(4) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

New York Penal Law § 155.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to

appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by tespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property.

A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as to the case may be, does not believe that the third person intends to engage in such conduct.

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or

(vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationship.

Florida Statutes Annotated §812.021 "Larceny" defined; penalties; sufficiency of indictment, information or warrant

(1) A person who with intent unlawfully to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person;

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes; withholds, or appropriates to his own use, or that of any other than the true owner, any property;

(b) Having in his possession, custody or control, as a broker, bailee, public servant, attorney, agent, employee, clerk, trustee, or officer of any person, association, or corporation, member of copartnership, pool or joint venture, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any property, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof;

(c) While acting as executor, administrator, committee, guardian, receiver, collector, or trustee of any description, appointed by a deed, will, or other instrument, or by an order or judgment of a court or officer, secretes, withholds or otherwise appropriates to his own use, or that of any person other than the true owner or person entitled thereto any property in his possession or custody by virtue of his office, employment, or appointment;

(d) Takes unpurchased merchandise of any mercantile establishment on the premises of such establishment with the intent to convert the same to personal use without paying the purchase price therefor;

(e) Obtains property of another by threatening to:

1. Accuse anyone of a criminal offense.

2. Expose any secret tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute.

3. Take or withhold action as a public servant.

4. Bring about or continue a strike, boycott, or other collective unofficial action if the property is not demanded or received for the benefit of the group in whose interest the defendant purports to act.

5. Testify or provide information, or withhold testimony or information, with respect to another's legal claim or defense.

(f) Fails to take reasonable measures to restore property which he knows to have been

lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient after he comes into control of such property; shall, upon conviction, be guilty of larceny.

(2) [Omitted. Deals with penalties]

(3) [Omitted. Deals with penalties]

(4) Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt, solicitation, or conspiracy to commit the same, or for being accessory thereto, that the purpose for which the owner was induced by color or aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof, was illegal, immoral, or unworthy.

(5) It shall be sufficient for any indictment, information, or warrant returned, filed, or issued under this section to charge generally that the defendant, at the time and in the county specified, did steal the personal or real property, thing in action, evidence of debt or contract, or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. It shall not be necessary when alleging the larceny of property over a period of time that the exact date or dates the property was taken be alleged, but instead the total period of time may be alleged generally. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same.

(6) [Omitted. Deals with evidentiary matter].

Ohio Supreme Court Rules of Practice, Rule V. Briefs on Merits in Appeal Cases

Section 1. Appellant's Brief. The appellant in all civil cases must file eighteen copies of a brief within ten days of the date the copies of the record are filed with the Court. The appellant in all criminal cases must file eighteen copies of a brief within forty days of the date of the allowance of the appeal. The body of the brief shall not exceed fifty pages. The page limitation shall not apply in cases involving the death penalty.

The appellant's brief must comply with Rule VI and contain:

(A) A Table of contents listing the table of authorities, statement of facts, argument (with the proposition or propositions of law and authorities relied upon to support the same) and appendix, all as required by the following subparagraphs of this rule, with references to the pages of the brief where each appears, and arranged as shown by the following sample:

[SAMPLE]

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES [if required, see Section 1(b) of this rule.] 1

STATEMENT OF FACTS 2

[May be divided between statement of the case and statement of facts. Appellee should confine

his statement to differences between the parties or to additional material.]

ARGUMENT 3

[Sample proposition of law taken from first paragraph of syllabus of Bureau of Support v. Kreitzer (1968), 16 Ohio St.2d 147, 243 N.E.2d 83.]

Proposition of Law No. 1:

The duty of the state of Ohio to support inmates (or patients) of benevolent institutions under the jurisdiction of the Department of Mental Hygiene and Correction, as set forth in R.C. 5121,01, is qualified by R.C. 5121.03, et seq., so that the nature of its liability for support is secondary. Primary liability for such support, at least in the case of a patient without dependents, rests absolutely upon the patient himself, by virtue of R.C. 5121,04(B)(1), or upon his estate 3

Authorities cited in support of Proposition of Law No. 1: [in the order in which they appear in the brief] State, ex rel. Price v. Huwe (1922), 105 Ohio St. 304, 137 N.E. 167 3

State v. Kiesewetter (1892), 37 Ohio St. 546 3

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R.C. 5121.10 4

R.C. 5121.04(B)(1) 4

R.C. 5121.03 5

Lackmann v. Dept. of Mental Hygiene, 156 Cal. App. 2d 674, 320 P.2d 186 5

[If desired, the argument under each Proposition of Law may be subdivided. Appellee shall

state the proposition in the form which would, if adopted, support judgment in his favor.]

Proposition of Law No. 2: 7

[State with successive numbers, each, if any, additional propositions relied upon.]

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[Note: All of the above mentioned documents must be included in the appellant's brief. They shall not be repeated in the printed record or appellee's brief.]

(B) If the total number of separate citations exceeds twelve (12), a table of authorities listing all cases or other authorities, arranged alphabetically, and all states, constitutional provisions, and departmental, board or commission regulations relied upon, with references to the pages of the brief where each citation appears.

(C) A statement of the facts with page references, in parentheses, to supporting portions of the printed or

nonprinted record and of the original transcript of testimony. (Obviously, in a memorandum under Rule II, Section 4, references to a printed or nonprinted record cannot be made.)

(D) An argument, which shall be headed by the proposition of law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of Drake v. Bucher, Supt. (1966), 5 Ohio St.2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

(E) An appendix containing (a) a copy of the notice of appeal to the Supreme Court, (b) a copy of the assignments of error filed in the Court of Appeals, (c) a copy of the judgment or order appealed from, (d) copies of all judgments, orders, and opinions rendered by any court or board in the case, (e) complete copies of any unreported case cited, (f) the rules or regulations of any department, board, commission or any other agency relied upon (such rules shall be set forth in full, or if too voluminous, a copy thereof shall be furnished with each copy of the brief), and (g) a copy of any statute or constitutional provision relied upon, to be construed or otherwise involved in the case. The pages of the appendix shall be numbered.

(F) If it is necessary to file multiple appeals from a single decision of a Court of Appeals or an administrative agency and such appears are docketed under separate case numbers, counsel for the appellants should, whenever, possible, file a single brief or memorandum for all

such appeals. The cover page of such brief or memorandum should contain the names and numbers of each case.

Section 2. Brief Opposing Appeal. Within thirty days of the filing of appellant's brief, the party opposing the appeal shall file a brief in form complying with the provisions of this rule and Rule VI and answering the appellant's contentions and making any other contentions deemed appropriate as reasons for affirmance of the order or judgment appealed from. The body of the brief shall not exceed fifty pages. The page limitation shall not apply in cases involving the death penalty.

Section 3. Reply Briefs. Any reply brief must be filed within twenty days after the filing of appellee's brief and must comply with Rule VI as to form. The body of the brief shall not exceed twenty pages. The page limitation shall not apply in cases involving the death penalty.

Section 4. Additional Authorities. In all cases where the brief filed in compliance with these rules do not contain all the authorities on which counsel intends to rely, there must be filed a brief statement of additional authorities. This statement should be filed at least five days before oral argument.

Section 5. Briefs Amicus Curiae. Briefs amicus curiae conforming to the requirements of this section may be filed with leave of Court. Any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support.

Section 6. Proof of Service. Service of a copy of each brief or statement of additional authorities shall be made

upon opposing counsel forthwith, and proof of service shall be filed with the Clerk.

No. 93-580

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For Allen County, Third Appellate District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. ARGUMENT

Obviously, the State of Ohio correctly states the law that "[t]he words of the statute can be used [in an indictment] if 'the words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' " Brief in Opposition, p. 7 (citing *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) and *Evans v. United States*, 153 U.S. 584, 14 S.Ct. 934, 38 L.Ed. 830 (1894).) However, it is exactly Mr. Lewis' position that the term "deception" fails to "fully, directly, and expressly, without any uncertainty

or ambiguity" apprise him of the element of the offense of which he was charged.

This is most notably demonstrated by the State of Ohio's *new* claim that the deception for which Mr. Lewis was convicted included "[his use of] his position as a police officer to create fear." Brief in Opposition, p. 8. Such a form of deception was never advanced prior to trial, during trial, or on appeal. Paraphrasing *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962):

> [Mr. Lewis] was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the [deception alleged by the State]. At every stage of the ensuing criminal proceeding [Mr. Lewis] was met with a different theory, or by no theory at all, as to what the [deception] had been. Far from informing [Mr. Lewis] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

Russell at 768, 82 S.Ct. at 1049.

As such, Mr. Lewis is not "angling towards an argument such as found in *Schad v. Arizona* [___ U.S. ___, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)]." Brief in Opposition, p. 9. As noted by the four dissenting justices in *Schad*:

> The issue is not whether the statute here is so vague that an individual cannot reasonably know what conduct is criminalized. Indeed, the statute's specificity renders our vagueness cases inapplicable.

Id., 111 S.Ct. at 2509 (White, J. dissenting). Unlike Mr. Lewis, the defendant in *Schad* knew exactly what conduct was alleged to constitute the offense: the killing of Lorimer Grove. While the defendant in *Schad* faced two well-defined theories of culpability, Mr. Lewis faced a never-defined theory, that changed throughout the trial and appeal. Rather than abandon the alternative theories, as suggested in Brief in Opposition, p. 9, the State of Ohio has continuously advanced many ever-changing theories, as is evidenced by the advancement of four different theories on the preceding page of the State's Brief. Brief in Opposition, p. 8.

Nor is the State of Ohio's argument supported by the citation to *Schad* for the proposition that

> where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate.

Brief in Opposition, pp. 9-10 (quoting *Schad*, 111 S.Ct. at 2501, 115 L.Ed.2d at 570-571). Rather, as demonstrated in the Petition for Writ of Certiorari, pp. 19-20, Ohio's theft statute defines as a single crime a "plethora" of former crimes under the "broad concept" of "deception." As such, there is no "long history" to serve as notice to Mr. Lewis as to what specific conduct the indictment charged. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in

the same generic terms as in the definition; but it must state the species, – it must descend to particulars." *Russell* at 765, 82 S.Ct. at 1047.

The "liberal discovery" and "list of witnesses" provided by the State of Ohio, Brief in Opposition, p. 10, did not inform Mr. Lewis of the nature and cause of the accusation. Rather, it merely informed Mr. Lewis of whom the State of Ohio intended to call to prove the undefined accusation. The fact that Mr. Lewis "presented a vigorous defense," and "called ten witnesses on his behalf," *id.*, likewise does not demonstrate that Mr. Lewis was informed of the nature and cause of the accusation. In fact, Mr. Lewis' vigorous defense in demonstrating that he had provided services for Ms. Shepherd and that she wanted him to have the money he received – a defense to the State of Ohio's theory of guilt prior to trial – was advanced by the State of Ohio as evidence of deception after trial. As the offense was charged in such vague and generic terms, the State of Ohio was permitted to change the accusation so as to use Mr. Lewis' defense as evidence of guilt.

The State of Ohio points to theft statutes in Florida[1] and New York, alleging that the Ohio statute "is more specific than similar statutes in in [sic] other states. Brief in Opposition, p. 10. However, Florida Rules of Criminal Procedure, Rule 3.140(d)(1) provides in part:

---

[1] Respondent cites to Florida Statutes Annotated § 812.021. Brief in Opposition, p. 12. That statute was repealed effective October 1, 1977. Florida's current theft statute and corresponding definitions, Florida Statutes Annotated §§ 812.012 and 812.014, are provided in the appendix.

> (1) *Allegation of Facts; Citation of Law Violated.* Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. . . .

Florida Rules of Criminal Procedure, Rule 3.140(n) provides:

> **(n) Statement of Particulars.** The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. *Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.*

(emphasis supplied). The Committee Notes to subparagraph (n) recognize that the new rule narrows the scope of judicial discretion in granting the statement of particulars.

In reproducing New York Penal Law § 155.05, Brief in Opposition, App. 1, the State of Ohio omitted a paragraph under larceny by false promise describing the heightened evidentiary requirements of proving larceny by false promise.[2] As in Florida, New York Criminal

---

[2] The complete text of New York Penal Law § 155.05 is provided in the appendix.

Procedure Law § 200.50 provides that an indictment must contain:

> 7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,
>
> (a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .

The Practice Commentary to § 200.50 notes that:

> The specifics of the indictment as supplemented by the bill of particulars assume a critical role at trial. Here the indictment serves as a guideline to prevent the case from being prosecuted and submitted to the petit jury for ultimate determination on a theory other than the one charged by the grand jury. Where that occurs, the error is known as "variance" and should timely objection be overruled, it requires reversal of the conviction. See *e.g.*, *People v. Grega*, 1988, 72 N.Y.2d 489, 534 N.Y.S.2d 674, 531 N.E.2d 279, on remand 146 A.D.2d 871, 536 N.Y.S.2d 581.

Thus it appears that both Florida and New York provide safeguards not present in Ohio.

Even if the State of Ohio is correct that the Ohio practice is no worse than the practices of Florida and New York, such a fact would provide an additional incentive for this Court to grant certiorari in this cause. Obviously, where the words of statute, due to their generic nature, fail to apprise an accused of the nature of the

offense for which he is charged, it is no answer to point to other statutes suffering from the same defect. By condemning the Ohio practice of charging offenses in generic terms and failing to inform the accused of the nature and cause of the accusation, as mandated by the Sixth Amendment to the United States Constitution, this Court will provide guidance to other states whose statutes define crimes in similar generic terms. This Court should grant Mr. Lewis' writ on his behalf and on the behalf of others similarly situated, and declare the current Ohio practice unconstitutional.

II. CONCLUSION

WHEREFORE; petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeals for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

Respectfully submitted,

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No. 93-580

In The

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APPENDIX

Florida Statutes Annotated § 812.012

812.012. Definitions

As used in ss. 812.012-812.037:

(1) "Dealer in property" means any person in the business of buying and selling property.

(2) "Obtains or uses" means any manner of:

(a) Taking or exercising control over property.

(b) Making any unauthorized use, disposition, or transfer of property.

(c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.

(d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or

2. Other conduct similar in nature.

(3) "Property" means anything of value, and includes:

(a) Real property, including things growing on, affixed to, and found in land.

(b) Tangible or intangible personal property, including rights, privileges, interests, and claims.

(c) Services.

(4) "Property of another" means property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

(5) "Services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

(a) Repairs or improvements to property.

(b) Professional services.

(c) Private, public, or government communication, transportation, power, water, or sanitation services.

(d) Lodging accommodations.

(e) Admissions to places of exhibition or entertainment.

(6) "Stolen property" means property that has been the subject of any criminally wrongful taking.

(7) "Traffic" means:

(a) To sell, transfer, distribute, dispense, or otherwise dispose of property.

(b) To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

(8) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity.

(9) "Value" means value determined according to any of the following:

(a) 1. Value means the market value of the property at the time and place of the offense or, if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

2. The value of a written instrument that does not have a readily ascertainable market value, in the case of an instrument such as a check, draft, or promissory note, is the amount due or collectible or is, in the case of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss that the

owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

3. The value of a trade secret that does not have a readily ascertainable market value is any reasonable value representing the damage to the owner, suffered by reason of losing an advantage over those who do not know of or use the trade secret.

(b) If the value of property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount; if no such minimum value can be ascertained, the value is an amount less than $100.

(c) Amounts of value of separate properties involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or from several persons, may be aggregated in determining the grade of the offense.

Florida Statutes Annotated § 812.014

812.014. Theft

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

(2)(a) If the property stolen is valued at $100,000 or more, the offender commits grand theft in the first degree, punishable as a felony of the first degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the property stolen is valued at $20,000 or more, but less than $100,000, the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $20,000.

2. A will, codicil, or other testamentary instrument.

3. A firearm.

4. A motor vehicle.

5. Any commercially farmed animal, including any animal of the equine, bovine, or swine class, or other grazing animal, and including aquaculture species raised at a permitted aquaculture facility.

6. Any fire extinguisher.

7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.

8. Taken from a designated construction site identified by the posting of a sign as provided for in s. 810.09(2)(d).

(d) Theft of any property not specified in paragraph (a), paragraph (b), or paragraph (c) is petit theft and a

misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A person who commits petit theft and who has previously been convicted of any theft commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. A person who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

(d)1. Every judgment of guilty or not guilty of a petit theft shall be in writing, signed by the judge, and recorded by the clerk of the circuit court. The judge shall cause to be affixed to every such written judgment of guilty of petit theft, in open court and in the presence of such judge, the fingerprints of the defendant against whom such judgment is rendered. Such fingerprints shall be affixed beneath the judge's signature to such judgment. Beneath such fingerprints shall be appended a certificate to the following effect:

"I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, . . . , and that they were placed thereon by said defendant in my presence, in open court, this the . . . day of . . . , 19 . . . " Such certificate shall be signed by the judge, whose signature thereto shall be followed by the word "Judge."

2. Any such written judgment of guilty of a petit theft, or a certified copy thereof, is admissible in evidence in the courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge

are the fingerprints of the defendant against whom such judgment of guilty of a petit theft was rendered.

(3) Failure to comply with the terms of a lease when the lease is for a term of 1 year or longer shall not constitute a violation of this section unless demand for the return of the property leased has been made in writing and the lessee has failed to return the property within 7 days of his receipt of the demand for return of the property. A demand mailed by certified or registered mail, evidenced by return receipt, to the last known address of the lessee shall be deemed sufficient and equivalent to the demand having been received by the lessee, whether such demand shall be returned undelivered or not.

Florida Rules of Criminal Procedure

Rule 3.140. Indictments; Informations

(a) Methods of Prosecution.

(1) *Capital Crimes.* An offense that may be punished by death shall be prosecuted by indictment.

(2) *Other Crimes.* The prosecution of all other criminal offenses shall be as follows:

In circuit courts and county courts, prosecution shall be solely by indictment or information, except that prosecution in county courts for violations of municipal ordinances and metropolitan county ordinances may be by affidavit or docket entries and prosecutions for misdemeanors, municipal ordinances, and county ordinances may be by notice to appear issued and served pursuant to rule 3.125. A grand jury may indict for any offense. When a grand jury returns an indictment for an offense not triable in the circuit court, the circuit judge shall either issue a summons returnable in the county court or shall bail the accused for trial in the county court, and the judge, or at the judge's direction, the clerk of the circuit court, shall certify the indictment and file it in the records of the county court.

(b) Nature of Indictment or Information. The indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

(c) Caption, Commencement, Date, and Personal Statistics.

(1) *Caption.* No formal caption is essential to the validity of an indictment or information on which the defendant is to be tried. Upon objection made as to its absence a caption shall be prefixed in substantially the following manner:

In the (name of court)

State of Florida versus (name of defendant)

Any defect, error, or omission in a caption may be amended as of course, at any stage of the proceeding, whether before or after a plea to the merits, by court order.

(2) *Commencement.* All indictments or informations on which the defendant is to be tried shall expressly state that the prosecution is brought in the name and by the authority of the State of Florida. Indictments shall state that the defendant is charged by the grand jury of the county. Information shall state that the appropriate prosecuting attorney makes the charge.

(3) *Date.* Every indictment or information on which the defendant is to be tried shall bear the date (day, month, year) that it is filed in each court in which it is so filed.

(4) *Personal Statistics.* Every indictment or information shall include the defendant's race, gender, date of birth, and social security number when any of these facts are known. Failure to include these facts shall not invalidate an otherwise sufficient indictment or information.

(d) The Charge.

(1) *Allegation of Facts; Citation of Law Violated.* Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In addition, each count shall recite the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be ground for dismissing the count or for a reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) *Name of Accused.* The name of the accused person shall be stated, if known, and if not known, the person may be described by any name or description by which the person can be identified with reasonable certainty. If the grand jury, prosecuting attorney, or affiant making the charge does not know either the name of the accused or any name or description by which the accused can be identified with reasonable certainty, the indictment or information, as the case may be, shall so allege and the accused may be charged by a fictitious name.

(3) *Time and Place.* Each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged in the act or transaction or on 2 or more acts or transactions connected together, provided the court in which the indictment or information is filed has jurisdiction to try all of the offenses charged.

(4) *Allegation of Intent to Defraud.* If an intent to defraud is required as an element of the offense to be charged, it shall be sufficient to allege an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded.

(e) Incorporation by Reference. Allegations made in 1 count shall not be incorporated by reference in another count.

(f) Endorsement and Signature; Indictment. An indictment shall be signed by the foreperson or the acting foreperson of the grand jury returning it. The state attorney or acting state attorney or an assistant state attorney shall make and sign a statement on the indictment to the effect that he or she has advised the grand jury returning the indictment as authorized and required by law. No objection to the indictment, on the ground that the statement has not been made shall be entertained after the defendant pleads to the merits.

(g) Signature, Oath, and Certification; Information. An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense. An information charging the commission of a misdemeanor shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution. No objection to an information on the ground that it was not signed or verified, as

herein provided, shall be entertained after the defendant pleads to the merits.

(h) Conclusion. An indictment or information on which the defendant is to be tried need contain no formal conclusion.

(i) Surplusage. An unnecessary allegation may be disregarded as surplusage and, on motion of the defendant, may be stricken from the pleading by the court.

(j) Amendment of Information. An information on which the defendant is to be tried that charges an offense may be amended on the motion of the prosecuting attorney or defendant at any time prior to trial because of formal defects.

(k) Form of Certain Allegations. Allegations concerning the following items may be alleged as indicated below:

(1) *Description of Written Instruments.* Instruments consisting wholly or in part of writing or figures, pictures, or designs may be described by any term by which they are usually known or may be identified, without setting forth a copy or facsimile thereof.

(2) *Words; Pictures.* Necessary averments relative to spoken or written words or pictures may be made by the general purport of such words or pictures without setting forth a copy or facsimile thereof.

(3) *Judgments; Determinations; Proceedings.* A judgment, determination, or proceeding of any court or official, civil or military, may be alleged generally in such a manner as to identify the judgment, determination, or proceeding,

without alleging facts conferring jurisdiction on the court or official.

(4) *Exceptions; Excuses; Provisos.* Statutory exceptions, excuses, or provisos relative to offenses created or defined by statute need not be negatived [sic] by allegation.

(5) *Alternative or Disjunctive Allegations.* For an offense that may be committed by doing 1 or more of several acts, or by 1 or more of several means, or with 1 or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results.

(6) *Offenses Divided into Degrees.* For an offense divided into degrees it is sufficient to charge the commission of the offense without specifying the degree.

(7) *Felonies.* It shall not be necessary to allege that the offense charged is a felony or was done feloniously.

(l) Custody of Indictment or Information. Unless the defendant named therein has been previously released on a citation, order to appear, personal recognizance, or bail, or has been summoned to appear, or unless otherwise ordered by the court having jurisdiction, all indictments or informations and the records thereof shall be in the custody of the clerk of the court to which they are presented and shall not be inspected by any person other than the judge, clerk, attorney general, and prosecuting attorney until the defendant is in custody or until 1 year has elapsed between the return of an indictment or the filing of an information, after which time they shall be opened for public inspection.

(m) Defendant's Right to Copy of Indictment or Information. Each person who has been indicted or informed against for an offense shall, on application to the clerk, be furnished a copy of the indictment or information and the endorsements thereon, at least 24 hours before being required to plead to the indictment or information if a copy has not been so furnished. A failure to furnish a copy shall not effect the validity of any subsequent proceeding against the defendant if he or she pleads to the indictment or information.

(n) Statement of Particulars. The court, on motion, shall order the prosecuting attorney to furnish a statement of particulars when the indictment or information on which the defendant is to be tried fails to inform the defendant of the particulars of the offense sufficiently to enable the defendant to prepare a defense. The statement of particulars shall specify as definitely as possible the place, date, and all other material facts of the crime charged that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. Reasonable doubts concerning the construction of this rule shall be resolved in favor of the defendant.

(o) Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after

conviction or acquittal to substantial danger of a new prosecution for the same offense.

Committee Notes to Florida Rules of Criminal Procedure, Rule 3.140(n):

(n) Statement of Particulars. The phrase, "bill of particulars," has been modernized by changing "bill" to "statement." Historically, a "bill" is a written statement. The first sentence of this proposal is taken from section 906.27, Florida Statutes, the only change being the narrowing of the scope of judicial discretion now granted by the statute. The latter part of the proposal is recommended in order to clarify the requirements of the rule. Provision for the accusatorial affidavit has been added.

New York Penal Law § 155.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by tespassory taking, common law larceny by trick embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property.

A person acquires lost property when he exercises control over property of another which

he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as to the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person to deliver such property to himself or to

a third person by means of instilling in him a fear that, if the property is not so delivered the actor or another will:

(i) Cause physical injury to some person in the future; or

(ii) Cause damage to property; or

(iii) Engage in other conduct constituting a crime; or

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or

(vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person

materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationship.

New York Criminal Procedure Law § 200.50 and Practice Commentaries

§ 200.50 Indictment; form and content

An indictment must contain:

1. The name of the superior court in which it is filed; and

2. The title of the action and, where the defendant is a juvenile offender, a statement in the title that the defendant is charged as a juvenile offender; and

3. A separate accusation or count addressed to each offense charged, if there be more than one; and

4. A statement in each count that the grand jury, or, where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense; and

5. A statement in each count that the offense charged therein was committed in a designated county; and

6. A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,

(a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly

apprise the defendant or defendants of the conduct which is the subject of the accusation; and

(b) in the case of any armed felony, as defined in subdivision forty-one of section 1.20, states that such offense is an armed felony and specifies the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, specifies what the implement appeared to be; and

8. The signature of the foreman or acting foreman of the grand jury, except where the indictment has been ordered reduced pursuant to subdivision one-a of section 210.20 of this chapter or the accusatory instrument is a superior court information; and

9. The signature of the district attorney.

Practice Commentaries

by Peter Preiser

This section prescribes the formal requisites for an indictment. Subdivisions one, two, three, five, eight and nine deal with mechanics and do not appear to call for explication. The Practice Commentaries for certain other CPL sections may, however, be of assistance to those in search of the rationale for some of these formal components. Thus, the rationale for the juvenile offender designation required by subdivision two is explained in the Practice Commentaries on CPL § 180.75. For subdivision three, see the Commentaries on CPL § 200.30. The Commentaries for CPL § 20.40 should be of use in connection

with subdivision five. And for subdivisions eight and nine, see the Commentaries for CPL § 200.10.

Subdivisions four, six and seven are designed to fulfill the following purposes: inform the defendant of the crime charged so as to enable preparation for defense at trial; enable determination of whether the facts alleged by the grand jury are legally sufficient to constitute the offense charged; assure that the offense to be tried is the same in name and in theory as the one voted by the grand jury – as opposed to some variation substituted by the prosecutor; and serve as a record to be used on a motion to bar a subsequent prosecution in violation of the double jeopardy provisions of CPL Article 40.

In considering these purposes it is important to observe that an indictment may be technically adequate to fulfill the requirements of this section, but nevertheless lack sufficient substance to be of any practical value to the defendant in regard to one or more of the factors. The reason for this seeming paradox is that under modern criminal procedure the defendant may demand and receive substantial additional pre-trial information through a bill of particulars (CPL § 200.95) and through discovery (CPL Article 240). The defendant also has a virtually absolute right to require the trial court to inspect the minutes of the grand jury proceeding to determine legal sufficiency of the evidence before the grand jury (see CPL § 210.30[2], [3]). Note too, that the availability of these supplementary aids has led the courts to conclude that an insufficiency in the factual allegations is not a jurisdictional defect: it is cause for dismissal on a motion timely made; but is deemed waived where the motion is not made or a plea of a guilty is entered. See

People v. Iannone, 1978, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656; *People v. Cohen*, 1981, 52 N.Y.2d 584, 439 N.Y.S.2d 321, 421 N.E.2d 813; see also *People v. Alejandro*, 1987, 70 N.Y.2d 133, 138-139, 517 N.Y.S.2d 927, 511 N.E.2d 71.

The specifics of the indictment as supplemented by the bill of particulars assume a critical role at trial. Here the indictment serves as a guideline to prevent the case from being prosecuted and submitted to the petit jury for ultimate determination on a theory other than the one charged by the grand jury. Where that occurs, the error is known as "variance" and, should timely objection be overruled, it requires reversal of the conviction. See *e.g.*, *People v. Grega*, 1988, 72 N.Y.2d 489, 534 N.Y.S.2d 647, 531 N.E.2d 279, on remand 146 A.D.2d 871, 536 N.Y.S.2d 581. Variance should be distinguished, however, from a situation where the indictment alleges more than is necessary to support the offense charged. In such case – assuming absence of duplicity (see CPL § 200.30) – the prosecution need only prove facts necessary for conviction, and the balance of the factual allegations may be disregarded as surplusage. See *People v. Charles*, 1984, 61 N.Y.2d 321, 473 N.Y.S.2d 941, 462 N.E.2d 118.